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in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

NO. 73-151

JULIO FUENTES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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JULIO FUENTES,

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PETITION FOR WRIT OF CERTIORARI PURSUANT TO 28 UNITED STATES CODE, SECTION 1254(1)

The petitioner, JULIO FUENTES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on May 4, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 4, 1973. A timely petition for rehearing and rehearing en banc was denied on June 21, 1973. Upon petitioner's motion, the issuance of the mandate was stayed by the Court of Appeals to and including July 21, 1973.[1] This petition is timely. This Court's jurisdiction is invoked under 28 United States Code Section 1254(1).

[1]The Court of Appeals decision affirmed the convictions of several persons, including Fuentes. However only Fuentes' motion to stay the issuance of the mandate was granted. Only he raised the issue of the validity of an indictment based upon no evidence.

QUESTIONS PRESENTED FOR REVIEW

I.

MAY A DEFENDANT IN A FEDERAL CRIMINAL CASE BE REQUIRED TO STAND TRIAL AND A CONVICTION BE SUSTAINED WHERE NO EVIDENCE ESTABLISHING PROBABLE CAUSE WAS PRESENTED TO THE GRAND JURY WHICH INDICTED HIM?

II.

DOES THE FIFTH AMENDMENT GUARANTY THAT NO PERSON SHALL BE HELD TO ANSWER FOR A CRIME UNLESS ON AN INDICTMENT OF A GRAND JURY, PERMIT AN INDICTMENT TO BE BASED UPON HEARSAY TESTIMONY WHEN DIRECT TESTIMONY WAS READILY AVAILABLE AND THE GRAND JURY WAS MISLED INTO THINKING IT WAS RECEIVING DIRECT TESTIMONY?

III.

EVEN IF THE FIFTH AMENDMENT WOULD NOT BE VIOLATED BY AN INDICTMENT BASED UPON HEARSAY TESTIMONY WHEN DIRECT TESTIMONY WAS READILY AVAILABLE AND THE GRAND JURY WAS MISLED INTO THINKING IT WAS RECEIVING DIRECT TESTIMONY, SHOULD THE SUPREME COURT SET FORTH A SUPERVISORY RULE PREVENTING SUCH PROSECUTORIAL MANIPULATION OF GRAND JURY PROCEEDINGS?

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On August 6, 1971, JULIO FUENTES was indicted by a grand jury in the Southern District of Florida on two counts of violating Interstate Transportation of Stolen Motor Vehicle Statutes, Title 18 United States Code Sections 2312 and 2313, and one count of conspiracy to violate said statutes. He was one of forty (40) people indicted. The indictment contained forty (40) counts. FUENTES was named in three counts.

The sole testimony presented to the grand jury came from one government agent. The only testimony relating to FUENTES was:

"Q. Let me ask you this. What was the role of Mario Ferrer and Julio Fuentes?

A. They were car dealers. They were partners. They bought this car for $1,400.00. It's worth about $2,400.00. The car had previously been painted by Mouriz, and where the serial numbers were changed, and Felix Aleman disposed of the car as he had done with the other cars, and he transported the car from Dave's Auto Parts where it had been purchased from David Danovitz and Phillip Cannella.

Q. Did they ship that car to Puerto Rico?

A. Yes, they did and we verified the theft and recovered the car."

The agent's recitation was based on hearsay. The court below found that direct testimony was available. In addition, the prosecutor had provided the government agent,

and each of the grand jurors, with a copy of a previously prepared indictment. Throughout the grand jury proceedings, the agent testified from the indictment using hearsay and summary type evidence.

FUENTES moved to dismiss the indictment. The motion was denied. The trial court granted FUENTES a judgment of acquittal on the conspiracy count and convicted him on the two remaining counts. He was sentenced to three (3) years probation on one count and six (6) months imprisonment on the other.

An appeal to the Fifth Circuit followed on behalf of FUENTES and four other defendants who were also convicted. In that appeal FUENTES raised the three issues presented here. In his petition for rehearing he reiterated the claim that the failure to establish probable cause rendered the indictment and conviction invalid.

The Fifth Circuit opinion did not address that claim. The petition for rehearing reiterating the claim was denied. The motion to stay issuance of the mandate pending this petition again raised the issue that no evidence establishing probable cause was presented to the grand jury. The motion was granted.

The petitioner is at liberty upon a Five-Thousand ($5,000.00) Dollar appeal bond set by the trial court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT MUST BE SETTLED BY THIS COURT, AND CONFLICTS WITH THE IMPLICIT HOLDING OF *COSTELLO vs. UNITED STATES*, 350 U.S. 359 (1956).

No case has directly confronted the issue of the validity of an indictment returned by a grand jury which received no evidence establishing probable cause.

Last term the court reaffirmed the principle that one of the functions of a grand jury is to determine "if there is probable cause to believe that a crime has been committed." *Branzburg vs. Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 643 (1972).

In *Costello vs. United States*, 350 U.S. 359 (1956), the court implied that evidence presented to a grand jury must establish probable cause in order to sustain an indictment. Justice Burton, concurring in *Costello*, wrote:

> "I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown *that the grand jury had before it not substantial evidence upon which to base its indictment, that indictment should be quashed.* To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

Id. at 364. (emphasis supplied)

This case presents a stark test of the importance of the Fifth Amendment guaranty that no person *shall be held to answer* unless on an indictment of a grand jury. The fact that FUENTES was convicted does not denigrate his claim. For nearly a hundred years it has been established that a conviction obtained after indictment by an illegally constituted grand jury is invalid. *Strauder vs. West Virginia*, 100 U.S. 303 (1880); *Alexander vs. Louisiana*, 405 U.S. 625, 628 (1972). A conviction obtained upon an empty indictment is equally invalid, *United States v. Estepa*, 471 F.2d 1132 (2d Cir., 1972). To hold otherwise would be to undermine the integrity of this Fifth Amendment guaranty.

The function of a grand jury is to stand between the prosecutor and the accused. Present day practices have eroded that function. Unless this court requires that evidence establishing probable cause be presented to a grand jury as a predicate for indictment, this erosion will continue.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND PRESENTS A SERIOUS QUESTION IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

The Second Circuit has ruled that an indictment based upon hearsay will be dismissed if: (1) Direct testimony was available; (2) It was not inconvenient for the government to use that testimony and (3) The grand jury was misled into thinking it was getting direct testimony *or* there was a high probability that with eye-witness rather than hearsay testimony, the grand jury would not have

indicted. *United States vs. Liebowitz*, 420 F.2d 39 (2d Cir., 1969); *United States vs. Arcuri*, 282 F.Supp. 347, 351 (E.D. N.Y., 1969), affirmed 405 F.2d 691 (2d Cir., 1968). In *United States vs. Estepa*, 471 F.2d 1132 (2d Cir., 1972), the court reversed judgments of conviction and dismissed indictments because of the presentation of hearsay evidence to the grand jury.

The opinion below expressly rejected the Second Circuit decisions.[2] No other Circuit has adopted the Second Circuit position. Except for the Second Circuit, the Courts of Appeals have interpreted the broad language of *Costello vs. United States*, 350 U.S. 359 (1956), to mean that an indictment is an inviolable instrument.

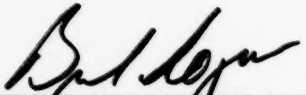
Thus the Fifth Amendment guaranty of indictment means one thing in Connecticut, New York and Vermont, and something less in the rest of the United States. Petitioner respectfully suggests that this Court should set one standard to govern the federal courts of the Nation.

[2]In footnote four of the opinion below, the court attempted to blunt it's rejection by saying that "The present case would not qualify even under the Second Circuit's 'best evidence' rule." That passing comment is inapplicable to Fuentes. The quoted portion of the grand jury testimony (p. 5 supra) and the complete grand jury testimony shows that the presentation of hearsay was misleading as to Fuentes.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of July, 1973, three copies of the Petition for Writ of Certiorari in this cause were served by United States Mail upon the HONORABLE ERWIN GRISWOLD, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

BRUCE S. ROGOW